Petition

81-1960

Supreme Court, U.S.
FILED
APR 8 1982
ALEXANDER L. STEVAS
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

PATRICIA A. JOHNSON,
Petitioner,

v.

THEODORE C. GRANHOLM, MICHAEL F. LUND,
DAVID F. TIBBETTS AND MONTMORENCY
COUNTY BOARD OF COMMISSIONERS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the decision below conflict with Michigan Supreme Court decisions as to the proper interpretation of governmental immunity, including quasi-judicial immunity?

2. Are there Michigan Statutes granting quasi-judicial immunity for Friends of the Court or Prosecuting Attorneys?

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PARTIES TO THE PROCEEDING

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QUESTIONS PRESENTED

1. Does the decision below conflict with Michigan Supreme Court decisions as to the proper interpretation of governmental immunity, including quasi-judicial immunity?

2. Are there Michigan Statutes granting quasi-judicial immunity for Friends of the Court or Prosecuting Attorneys?

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STATUTORY PROVISIONS INVOLVED

42 USCS § 1985 (2)

If two or more persons in any State or territory . . . conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protection of the laws, . . . they shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 USCS § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Now comes Patricia A. Johnson, by and through her attorney, Frances C. McIntyre, and prays that a Writ of Certiorari issue to review the Summary Judgment of the United States District Court for the Eastern District of Michigan, entered in the above-entitled cause on February 29, 1980, and judgment of the United States Court of Appeals for the Sixth Circuit affirming said judgment on November 6, 1981, Rehearing *En Banc* denied on January 18, 1982.

OPINIONS BELOW

The United States District Court for the Eastern District of Michigan by Memorandum and Opinion issued February 5, 1980, and Judgment issued February 29, 1980, granted Summary Judgment to Defendants Granholm, Lund and Tibbetts under the doctrine of quasi-judicial immunity, and to Defendants Montmorency County Board of Commissioners, stating that Plaintiff could not recover damages for the violations of civil rights under the theory of *respondeat superior,* citing *Monell v New York City Department of Social Services,* 436 US 658, 56 L Ed 2d 611 (1978) and *Garner v Memphis Police Department,* 600 F 2d 52 (CA 6, 1979), for Dismissal of Plaintiff's Complaint. This Memorandum of Opinion and Judgment is appended as Appendix A.

The United States District Court was affirmed by the United States Court of Appeals for the Sixth Circuit in an Order issued November 6, 1981. This order is appended as Appendix B. Plaintiff filed an application for Rehearing *En Banc* (See Appendix C), due to the fact that Plaintiff had argued points of law and fact in her appellate Brief, that were overlooked or misapprehended by the Sixth Circuit Court of Appeals. The Rehearing *En Banc* was denied by said Court on January 18, 1982. (See Appendix D).

STATEMENT OF JURISDICTION

The opinion of the United States District Court for the Eastern District of Michigan was issued February 5, 1980. The District Court's opinion was affirmed by the United States Court of Appeals for the Sixth Circuit in an Order issued November 6, 1981. A timely petition for rehearing *en banc* was denied on January 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Sec 1254 (1).

STATEMENT OF THE FACTS

Plaintiff, the mother of three children, who are now teenagers, was granted a divorce from her ex-husband on August 24, 1973. In said Divorce Judgment, Plaintiff was granted custody of the minor children, to wit:

Abra O. Johnson, Jr., born 6-29-61,
Debra Lynn Johnson, born 9-26-64, and
Judith Ann Johnson, born 3-4-68.

At the time of the Divorce Judgment Plaintiff was granted SIXTY ($60.00) DOLLARS per week child support, i.e., TWENTY ($20.00) DOLLARS per child, per week. At the time of the Judgment of Divorce, Defendant Granholm, the then Friend of the Court, had recommended that Plaintiff receive FORTY-FIVE ($45.00) DOLLARS per week child support or FIFTEEN ($15.00) DOLLARS per child, per week. Defendant Granholm admitted that he had relied on a "fact sheet" in-making his recommendations for child support.

At the time of the Judgment of Divorce, Plaintiff was a waitress earning only FOUR HUNDRED ($400.00) DOLLARS per month and her monthly expenses were SIX HUNDRED ($600.00) DOLLARS to SIX HUNDRED FIFTY ($650.00) DOLLARS per month.

On or about November 26, 1973, about three months after the Judgment of Divorce, a Show Cause Hearing was held due to the fact that Plaintiff's ex-husband was FOUR HUNDRED ($400.00) DOLLARS in arrears of the Court ordered child support, and although he failed to appear at the Show Cause, Defendant Granholm was hesitant to order a Bench Warrant for his arrest because he stated it was difficult to obtain one in the County where the ex-husband resided. Defendant Granholm, instead, asked for a continuance on December 10, 1973 and Plaintiff's ex-husband again failed to appear. At the continuance Defendant Granholm was unprepared to request a Wage Assignment, as he was unable to tell the Court what the exact support arrearages were. Due to Defendant Granholm's unpreparedness a Wage Assignment was not issued until January 18, 1974. Due to Defendant Granholm's unpreparedness Plaintiff and her three children, aged 12, 9 and 5 years, were without heat during the months of November, December, 1973 and January, 1974 and had very little to eat during those months.

On March 25, 1974, Defendant Granholm petitioned the Court to reduce the child support payments from SIXTY ($60.00) DOLLARS per week to FORTY-FIVE ($45.00) DOLLARS per week, without verifying Plaintiff's ex-husband's

true income, and the Court granted the reduction. On March 10, 1975, at another Show Cause Hearing, due to the ex-husband's failure to pay child support in the amount of FORTY-FIVE ($45.00) DOLLARS per week, and an arrearage of TWO HUNDRED EIGHTY-SEVEN ($287.00) DOLLARS, Defendant Granholm admitted to the Court that he was unprepared as he had again failed to verify Plaintiff's ex-husband's wages. At the March 10, 1975 Show Cause Hearing, Defendant Granholm advised the Court that according to the Friend of the Court's Schedule, Plaintiff's ex-husband should have his child support payments increased from FORTY-FIVE ($45.00) DOLLARS per week to SIXTY ($60.00) DOLLARS per week; but was unable to obtain such increase due to his failure of filing a Petition with the Court for the increase. Defendant Granholm also allowed Plaintiff's ex-husband to send her, then 13 year old son, of whom the Court had awarded her custody, to his mother in Tennessee without petitioning the Court for change of custody. The son had run away to his father's, due to the fact that he complained that Plaintiff only wanted him as a babysitter. Plaintiff had obtained two jobs as a waitress, at restaurants 35 miles apart in order to support herself and children, and needed her son to babysit, due to the fact that her ex-spouse was not keeping up his child support payments, and she could not get any cooperation from the Friend of the Court to make him do so, as on May 27, 1975 her ex-spouse again failed to appear for a Show Cause Hearing. When the Court queried Defendant Granholm as to whether Plaintiff's ex-spouse had failed to appear at other Show Cause hearings, he stated that said ex-spouse had always appeared before and therefore a continuance was ordered by the Court, instead of a Bench Warrant for the ex-spouse's arrest. Because of Plaintiff's protest that she was without heat and electricity, the Court granted another Show Cause Hearing on May 28, 1975, when the ex-spouse again failed to appear and Defendant Granholm requested a Writ of Attachment and protested when the Court instructed him to petition the Court for a Bench Warrant for the ex-spouse, and thereafter failed to do so, although he knew the Plaintiff had waited an entire year to get an increase in the child support, he had petitioned the Court to reduce, and her ex-spouse was in arrearage of TWO HUNDRED, EIGHTY-

SEVEN ($287.00) DOLLARS. When Plaintiff complained to Defendant Granholm of the preferential treatment he was giving her ex-spouse, to the detriment of herself and their children, and asked him if he were going to petition the Court for a Bench Warrant, Defendant Granholm told her he wasn't going to do a "damn" thing about it. Plaintiff alleges that Defendant Granholm told her on at least one occasion, "to get remarried, get a boyfriend or go on public assistance," but to "get off" his back about pressuring him for child support from her ex-spouse.

Plaintiff, due to great financial and mental strain and due to the fact that she could receive no help from the Friend of the Court, in getting adequate child support, took her two minor daughters, then ages 11 and 7 years, and left them on the doorstep of Defendant Granholm's home. Plaintiff alleges in her Complaint that she took said action in order to increase her work week to 70 hours per week to make enough money to hire an attorney to do the job that was the duty of the Friend of the Court.

Plaintiff already had lost her son, due to the fact that she had to work long hours and used him as a babysitter, to the extent that he was not able to have any free time as other boys enjoyed at the age of 13 years. She abhorred the idea of receiving public assistance, as her former spouse had been raised on public assistance, and she believed it would have a demoralizing and detrimental effect on her children and herself if she asked for public assistance.

On June 3, 1975, Defendant Granholm petitioned the Probate Court for a hearing regarding the Plaintiff's abandonment of her two daughters, without giving Notice to Plaintiff, although he was aware of her whereabouts. Plaintiff alleges that Defendant Granholm filed a report with the Probate Court accusing Plaintiff of acts that were untrue and she was unable to defend herself as she had not been notified of said hearing.

In July, 1976, Plaintiff retained an attorney and regained custody from Probate Court of her minor daughters on November 23, 1976. The Probate Court reinstated child support at FIFTEEN ($15.00) DOLLARS per week, per child and Plaintiff received THIRTY ($30.00) DOLLARS per week, as her son was

still living with his paternal grandmother in the State of Tennessee. Defendant Granholm had not yet petitioned the Court to increase the amount of the original decree of SIXTY ($60.00) DOLLARS per week or TWENTY ($20.00) DOLLARS per child, although he had admitted on March 10, 1975, that according to the Friend of the Court's Schedule, that SIXTY ($60.00) DOLLARS was the correct amount Plaintiff's ex-spouse should contribute. More than a year had passed.

After a couple of more hearings in Family Court, Plaintiff's attorney was notified by Defendant Granholm that Plaintiff's Petition for Modification of Support would have to be refiled in Circuit Court, although Plaintiff's attorney had received a hearing date for January 18, 1977 in Family Court. A hearing was then set for February 28, 1977 in Circuit Court.

At the Hearing in Circuit Court on February 28, 1977, for an increase in child support, Plaintiff's ex-spouse countered with a Petition for a Reduction in child support for Plaintiff's two daughters and requested that Plaintiff pay TWENTY ($20.00) DOLLARS per week, for her son, living in Tennessee. At said February 28, 1977 hearing, Plaintiff requested that her son be returned to her physical custody, as an award had never been made allowing her ex-husband or his mother custody of her son. At this Hearing, Defendant Granholm recommended that Plaintiff's ex-spouse's child support remain at FIFTEEN ($15.00) DOLLARS per child per week, although, again, he had not adequately verified his earnings, and also recommended that Plaintiff contribute TWENTY ($20.00) DOLLARS per week to her son's support. Due to the fact that Defendant Granholm had taken into account her ex-spouse's expenses and had not allowed hers, and had not taken into account her 70 hour work week when calculating her ability to contribute TWENTY ($20.00) DOLLARS per week to her son, the Michigan Court of Appeals reversed the Circuit Court's Order on February 22, 1979, finding that the Circuit Court had relied upon Plaintiff's part-time income in determining her ability to contribute child support to her son. The Court of Appeals said it did not believe " . . . that Plaintiff should be penalized for producing additional income to support her household, by locking her into a 50-70 hour work week, where Defendant's ability to pay child support was determined on a 40 hour work week."

On February 28, 1977 the Circuit Court ordered an increase in child support from Plaintiff's ex-spouse from FIFTEEN ($15.00) DOLLARS per week, per child to TWENTY ($20.00) DOLLARS per week, per child; but Defendant Granholm did not effect said increase in the Wage Assignment of Plaintiff's ex-spouse until the Fall of 1977.

Defendant Granholm never had the custody of Plaintiff's son changed to that of his paternal grandmother.

At the time of the February 28, 1977 Hearing, when Plaintiff was ordered to contribute TWENTY ($20.00) DOLLARS per week toward her son's support, she had never been served with the Uniform Reciprocal Enforcement of Support Act (URESA) Complaint, by Defendant Tibbetts, the Prosecuting Attorney, and therefore, was ordered to pay child support without notice of said URESA Complaint.

After filing an appeal from the Circuit Court's decision denying her a rehearing in order that her income and expenses could be adequately accounted for with the Michigan Court of Appeals, on September 9, 1977, Defendant Tibbetts served Plaintiff with the URESA Complaint (now 18 months old, as it was dated March 9, 1976), and an Order to Show Cause, simultaneously, for appearance in Probate Court, although the original Order that she was appealing was decreed in Circuit Court. The Show Cause Hearing was scheduled for November 22, 1977 in Probate Court. Plaintiff failed to appear and a warrant was issued for her arrest. On November 23, 1977, Plaintiff was arrested on her job and brought before the Court. At that time Plaintiff told the Court that she would refuse to appear at a hearing set for December 7, 1977 to determine if she should contribute child support to her son in Tennessee, as the matter was before the Michigan Court of Appeals, and that she had no faith in the lower courts, as she had appeared seven times there and no one had listened to her.

However, on December 7, 1977, Plaintiff did appear at the rescheduled Show Cause Hearing and told the Court that the issue of her paying child support to her son in Tennessee was before the Michigan Court of Appeals, that she had sent over EIGHT HUNDRED ($800.00) DOLLARS to her son directly and explained to the Court her plight in trying to get the

Friend of the Court to enforce the Circuit Court's child support orders from her ex-spouse and how she had to maintain two jobs in order to support her children. However, Plaintiff refused to answer Defendant Tibbetts' questions at the December 7, 1977 Hearing, and at his insistence, as Prosecuting Attorney, the Probate Court found her in contempt of court and she was sent to jail for ten (10) days, until December 16, 1977 when she purged herself of contempt and was released from jail. Defendant Tibbetts never followed through with any other hearings nor ever made her answer questions regarding her ability to pay child support to her son.

The present Friend of the Court, Defendant Lund, has advised Plaintiff that in order to get her ex-spouse's contribution to the support of her two daughters, who are living with her at this time and are ages 15 and 12 years old, raised to TWENTY ($20.00) DOLLARS per week, per child, she would have to retain a private attorney, although according to the Friend of the Court's Schedule her ex-spouse should be paying FORTY-FOUR ($44.00) DOLLARS per week, per child.

Many times in the past the Friend of the Court has petitioned the Court to reduce the amount of child support paid to Plaintiff by her ex-spouse, but now, and in the past it has consistently failed to petition the Court to increase the child support paid to Plaintiff, although it is aware of the ex-spouse's whereabouts, and the fact that he is not paying according to the Friend of the Court's support schedule.

Plaintiff's ex-attorney checked the Accounting Ledger of the Friend of the Court in August, 1977 and found errors, as it failed to show the unpaid balance or arrearage of Plaintiff's ex-spouse.

Plaintiff at this date continues to work two jobs as a waitress and her places of employment are some 35 miles apart. She currently has two teenage daughters living with her. Her son, Abra, has graduated from high school and still resides in the State of Tennessee with his paternal grandmother. He is completely alienated from Plaintiff and refused to even invite her to his graduation from high school. The Plaintiff's oldest teenager Debra, age 15, has run away once to her father's and accused her mother, as her son once did, of using her only as a babysitter for her younger daughter Judith, age 12.

REASONS FOR GRANTING THE WRIT

1. *The decision below conflicts with the Michigan Supreme Court decisions as to the proper interpretation of governmental immunity, including quasi-judicial immunity.*

The United States Court of Appeals for the Sixth Circuit stated in its order (affirming the U.S. District Court of the Eastern District's Order for Summary Judgment, on the basis of quasi-judicial immunity):

1). A public prosecutor is absolutely immune from a claim for damages based upon his official actions performed within the scope of his duties under *Imbler v Pachtman,* 424 U.S. 409 (1976) and defendant Tibbetts was entitled to this immunity in the present case;

2). A similar immunity attaches to the activities of other public officials who perform quasi-judicial duties under *Denmon v Leedy,* 479 F 2d 1097 (6th Cir. 1973); and

3). "Our examination of the Michigan Statutes which prescribe the duties and responsibilities of friends of the court leads us to the conclusion that the acts of the Defendants Granholm and Lund, which form the basis of the Plaintiff's claims, were performed by these defendants within the scope of their official quasi-judicial duties."

According to *Pittman v Taylor,* 398 Mich 41, 48 (1976) the Michigan Supreme Court stated:

'Government "instituted for [the] equal benefit, security and protection [of the people] "must accept responsibility for misfeasance causing injury to its citizens during the course of normal governmental operations. "It is plainly unjust to refuse relief to persons injured by the wrongful conduct of the State. No one seems to defend that refusal as fair," *Willis v Department of Conservation and Economic Development,* 55 NJ 534, 537-538, 264 A 2d 34, 36 (1970).

The court went on to cite from a ruling it had rendered in *Williams v Detroit,* 364 Mich 231, 258, 265, 111 NW 2d 1 (1961) that:

"The rule of governmental immunity has as legal defense only the argument that age has lent weight to the unjust whim of

long-dead kings. It is hard to say why the courts of America have adhered to this relic of absolutism so long a time after America overthrew monarchy itself!"

* * *

"[I]n relation to the doctrine of governmental immunity, 'the application of the rule is more harmful than helpful and results in more injustice that it prevents.' "

In its decision in *Pittman, supra* the Michigan Supreme Court said:

"The doctrine of governmental immunity is an historical anachronism which manifests an inefficient public policy and works injustice upon everyone concerned." *Brown v Wichita State University,* 217 Kan 279, 297, 540 P 2d 66 (1975)

"Accordingly, we hold that the traditional common-law judge-made immunity that the state and its instrumentalities heretofore enjoyed from its torts should be and it hereby is abrogated."

This conflict justifies the grant of certiorari to review the judgment below.

2. *There is no Michigan Statute granting quasi-judicial immunity for Friends of the Court or Prosecuting Attorneys.*

This conflict justifies the grant of certiorari to review the judgment below.

QUESTIONS OF SUBSTANTIAL INTEREST TO THE PUBLIC

1. This Court needs to settle once and for all if Summary Judgment denies a Plaintiff her rights to a trial on the merits as to whether officials who injured her are entitled to quasi-judicial immunity.

2. This Court needs to settle once and for all the question as to whether 42 USC §1983 and §1985 of the Civil Rights Act of 1871, stating that an individual may not be deprived of his

civil rights by an official acting under the color of state authority, has been negated to a large extent due to the use of Summary Judgments, thereby depriving plaintiff of having the motives of said officials tried on the merits before a Jury, in order to make a determination as to whether said officials' actions, although within the scope of his or her employment, were an abuse of his or her discretion.

3. This Court needs to settle once and for all the matter of whether an official enjoys quasi-judicial immunity if he commits an *ultra vires* act, even if it is within the scope of his official quasi-judicial duties, if the motive of the official was to abuse his discretion in order to inflict injury on a party with whom he or she has official dealings.

4. This Court needs to settle once and for all if a government body such as the Defendant Montmorency County Board of Commissioners is *not* liable for damages a party incurs due to the acts of quasi-judicial officials on the one hand, even when, by ordinance or State law, said County is liable for providing legal assistance and payment for any damages found against such judicial officials on the other hand. Thus, setting up an inequitable system of justice for anyone having the audacity to challenge any said judicial officials misdeeds!

5. This Court needs to settle once and for all if it is a question of fact or a question of law as to whether Defendants' Friend of the Court and Prosecuting Attorney's actions fall outside the scope of qualified immunity.

6. This court needs to settle once and for all if § 1983 and § 1985 are to have any force at all, should the Doctrine of Immunity be very narrowly defined.

7. Finally, this Court needs to make a distinction as to those actions performed by Defendants, which in no way would hamper the judicial discretion of the Court, should enjoy the cloak of quasi-judicial immunity and those that would. Thereby, depriving quasi-judicial officials of invoking absolute immunity for duties and actions that should no more enjoy quasi-judicial immunity than other officials of invoking absolute immunity for duties and actions that should no more enjoy quasi-judicial immunity, than other officials performing normal, everyday governmental duties.

In the case of *Slavin v Curry,* 575, F 2d, 156 (1978), the Court

stated that the existence and the extent of any immunity defense depends upon the position occupied by the Defendant, as well as the *motivation* of the Defendant.

Unless the District Court is thoroughly familiar with the position, *Slavin* said, it cannot determine whether the occupant of the position is entitled to absolute immunity, without first conducting a hearing. Also, for those having only a qualified immunity, a hearing is usually necessary to determine whether the Defendant's motiviation entitles him to a defense.

These questions justify the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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DATED: March 22, 1982

Appendix

APPENDIX "A"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

PATRICIA A. JOHNSON,
Plaintiff,

v

THEODORE C. GRANHOLM, et al,
Defendants.

CIVIL ACTION
NO. 79-10173

MEMORANDUM OPINION AND ORDER

At a session of said court, held in the
Federal Building, Bay City, Michigan
on February 4, 1980

Present: HONORABLE JAMES HARVEY
United States District Judge

On July 24, 1979, plaintiff brought this action seeking equitable relief and damages for the alleged violation by the defendants of her civil and constitutional rights under 42 USC 1983, 1985(3) and the Fourteenth Amendment to the United States Constitution. Plaintiff alleges in this regard that she was unlawfully ordered by the Montmorency Circuit Court to make child support payments of $20.00 per week for the support of one of her children residing in Tennessee with his grandparents. In addition, plaintiff alleges that she was, and is still being unlawfully hindered in her efforts to increase the payments for the support of two children living with her. The matter is before the Court on the motion of all the defendants herein for summary judgment.

DEFENDANTS GRANHOLM AND LUND

Defendants Granholm and Lund are officers of the Friend of the Court of Montmorency County. These defendants seek dismissal of the complaint on the grounds of quasi-judicial immunity.

The allegations against both of these named defendants relate to claimed abuse of their duties as Friend of the Court. Under Michigan law, the Friend of the Court is appointed by the Governor for the purpose of enforcing all delinquent payments ordered by the State Circuit Courts for the support of minor children in connection with divorce cases. MCLA 552.251 *et seq.* In addition, the Friend of the Court is authorized to seek adjustments in court-ordered child support payments to reflect increased or decreased ability to pay on the part of both spouses. MCLA 552.252a, 552.253.

This Court has previously held that officers of the Friend of the Court may be shielded from liability under the doctrine of quasi-judicial immunity. *Aker v Thomas,* Civil No. 77-40114 (Harvey, J., November 28, 1978). Under this doctrine, such officers are granted absolute immunity from damage claims based on alleged violations of civil rights arising out of acts committed within the scope of their jurisdiction and with the authorization of law. *Turner v American Bar Association,* 407 F Supp 451 (ND Tex, 1975), *affirmed* 542 F2d 56 (CA 5, 1976); *Burks v Callion,* 433 F2d 318 (CA 9, 1970), *cert denied* 403 US 908.

Since in this case the complaint predicates liability on acts of defendants Granholm and Lund committed as officers of the Montmorency County Friend of the Court arising out of their duties to enforce and adjust child support awards, said defendants are absolutely immune from any liability arising as a result of those activities under the doctrine of quasi-judicial immunity. *Aker v Thomas, supra* at 3; *Harmon v Superior Court,* 329 F2d 154 (CA 9, 1964); *Blouin v Demblitz,* 367 F Supp 415 (SD NY, 1973); *affirmed on other grounds,* 489 F2d 488 (CA 2, 1973).

The motion of defendants Granholm and Lund for summary judgment is accordingly GRANTED, and the complaint against said defendants is DISMISSED.

DEFENDANT TIBBETTS

Defendant Tibbetts is the prosecuting attorney of Montmorency County who is alleged to have abused his duties as prosecutor by filing suit against the plaintiff for failure to pay court-ordered child support obligations. The allegations against this defendant relate to claimed abuse of his official duties as prosecutor in his quasi-judicial capacity.

As such, defendant Tibbetts is absolutely immune from civil liability in this action. *Stump v Sparkman,* 435 US 349 (1978); *Imbler v Pachtman,* 424 US 409 (1976); *Dempsey v Radka,* Civil No. 76-10081 (Harvey, J., November 30, 1976), *affirmed,* Slip No. 77-1562 (CA 6, July 3, 1979).

The motion of defendant Tibbetts for summary judgment is accordingly GRANTED, and the complaint against said defendant is DISMISSED.

DEFENDANT MONTMORENCY COUNTY BOARD OF COMMISSIONERS

The action against Montmorency County Board of Commissioners is predicated solely on the allegation that defendants Granholm, Lund, and Tibbetts were employees of Montmorency County when they committed the acts allegedly giving rise to civil liability. In this regard, plaintiff is basing liability against the Board of Commissioners on the theory of *respondeat superior.*

The law is clear that one cannot recover damages for the violation of civil rights under the theory of *respondeat superior. Monell v New York City Department of Social Services,* 436 US 658, 56 L Ed 2d 611 (1978); *Garner v Memphis Police Department,* 600 F2d 52 (CA 6, 1979).

The motion of the Montmorency County Board of Commissioners for summary judgment is accordingly GRANTED, and the complaint against said defendant is DISMISSED.

IT IS SO ORDERED.

JAMES HARVEY
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

PATRICIA A. JOHNSON,
Plaintiff,

v

THEODORE C. GRANHOLM, et al,
Defendants.

CIVIL ACTION
NO. 79-10173

JUDGMENT

This action came on for hearing before the Court, Honorable James Harvey, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered;

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing and the action be dismissed on the merits.

Dated at Bay City, Michigan, this 29th day of February, 1980.

JOHN P. MAYER, Clerk

By SARA E. BIGSBY, Deputy Clerk

APPENDIX "B"
No. 80-1229

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PATRICIA A. JOHNSON,
Plaintiff-Appellant,

v

THEODORE C. GRANHOLM, MICHAEL F. LUND, DAVID F. TIBBETTS & MONTMORENCY COUNTY BOARD OF COMMISSIONERS,
Defendants-Appellees.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed November 6, 1981.

Before: WEICK, LIVELY and MARTIN, Circuit Judges.

PER CURIAM. The plaintiff appeals from judgment for the defendants in an action for damages pursuant to 42 U.S.C. § 1983. The defendants were two former friends of the court, the prosecuting attorney and the board of commissioners of Montmorency County, Michigan. The claim for damages was based on the manner in which the individual defendants had dealt with the failure of plaintiff's former husband to make child support payments as ordered in a divorce decree. Damages were sought from the county board of commissioners solely on the ground that it was the employer of the individual defendants.

The district court granted summary judgment in favor of all defendants. It held that the two friends of the court and the

prosecuting attorney are entitled to quasi-judicial immunity and that the board of commissioners may not be held liable on the basis of *respondeat superior*. We agree and affirm.

Even if the county board of commissioners was the employer of the individual defendants (a matter in dispute) the board would not be liable in damages for their actions in the absence of a showing that the acts complained of were taken by the individual defendants pursuant to a "policy or custom" of the municipal body. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978). There was no such showing in the present case.

A public prosecutor is absolutely immune from a claim for damages based upon his official actions performed within the scope of his duties. Imbler v. Pachtman, 424 U.S. 409 (1976). The defendant Tibbetts was entitled to this immunity in the present case. A similar immunity attaches to the activities of other public officials who perform quasi-judicial duties. *Denman v. Leedy*, 479 F.2d 1097 (6th Cir. 1973). *Our examination of the Michigan statutes which prescribe the duties and responsibilities of friends of the court leads us to the conclusion that the acts of the defendants Granholm and Lund which form the basis of the plaintiff's claims were performed by these defendants within the scope of their official quasi-judicial duties. Therefore, they were also entitled to immunity.*

The judgment of the district court is affirmed.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICIA A. JOHNSON,
Plaintiff-Appellant,

v

THEODORE C. GRANHOLM, MICHAEL F. LUND, DAVID F. TIBBETTS & MONTMORENCY COUNTY BOARD OF COMMISSIONERS,
Defendants-Appellees.

Civil Action
No. 80-1229
Court for the Eastern
District Court
No. 0645-1

PETITION FOR REHEARING *EN BANC* AND BRIEF

I EXPRESS A BELIEF, BASED ON A REASONED AND STUDIED PROFESSIONAL JUDGMENT, THAT THIS APPEAL INVOLVES ONE OR MORE QUESTIONS OF EXCEPTIONAL IMPORTANCE:

1. May the Court take judicial notice, from the reading of a statute, as to whether an official's acts were ministerial or discretionary?

2. Is the determination of whether an official's acts are ministerial or discretionary, a question of fact or law?

3. Does an affidavit by an official merely affirming that he acted within the scope of his employment give rise to Summary Judgment on the basis of quasi-judicial immunity?

4. May an official commit injuries to a party of any magnitude, and hide behind the cloak of immunity, even though the acts committed were malicious and intentional and a breach of a ministerial duty?

5. Did this Court address all of the questions of law under which this suit is being pursued?

6. Why was the per curiam order of this Court completely contradictory to statements made by a majority of the panel that the lower court did not have enough evidence before it to grant Summary Judgment on the basis of quasi-judicial or absolute immunity without having taken any depositions to determine if Defendant's acts were ministerial or discretionary?

7. Does the State of Michigan either by case law or statutory law grant quasi-judicial immunity or absolute immunity to officials who abuse their ministerial duties?

DATED: December 11, 1981

BY: FRANCES McINTYRE-LEONARD, P 28468
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of Record
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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PATRICIA A. JOHNSON,
Plaintiff-Appellant,

v

THEODORE C. GRANHOLM, MICHAEL F. LUND, DAVID F. TIBBETTS & MONTMORENCY COUNTY BOARD OF COMMISSIONERS,
Defendants-Appellees.

APPEAL from the United States District Court for the Eastern District of Michigan.

PETITION FOR REHEARING *EN BANC*

NOW COMES, FRANCES McINTYRE-LEONARD, Attorney for Plaintiff-Appellant, PATRICIA A. JOHNSON, and requests this Honorable Court to grant a Petition For Rehearing En Banc for the following reasons:

1. That the per curiam order by this Honorable Court affirming the order for Summary Judgment was questionable and completely contradictory to statements and questions raised by the justices at the time of oral argument, to-wit:

A. There was not enough information in the record for the lower court to determine that defendants were entitled to Summary Judgment (Justice Lively, 10-8-81 during Oral Argument presentation).

B. That the lower court could not grant Summary Judgment as a matter of law, without more than mere affidavits stating Defendants' occupation and the fact that any acts they performed were within the scope of their duties. (Justice Lively, 10-8-81 during Oral Argument presentation).

C. That in reviewing the Michigan Statutes regarding the duties of the Friend of the Court, it would appear that the duties of the Friend of the Court are mandatory and therefore

ministerial (Justice Lively, 10-8-81, during Oral Argument presentation).

D. Plaintiff-Appellant presented over 26 exhibits, many of them Court Transcripts that give credence there are issues in dispute that may give rise to a cause of action. (Justice Lively, 10-8-81, during Oral Argument presentation).

2. That this Court had no basis to affirm the Lower Court's order, if the Lower Court had no basis to grant Summary Judgment as a matter of law.

3. That federal case law interpreting the Summary Judgment Rule 56 of the Federal Rules of Civil Procedure, states that Summary Judgment may properly be granted only if there is no genuine issue as to any material facts.

4. That the issue of whether Defendants' acts were ministerial or discretionary, without more than the mere affidavits submitted, is a question of fact and not a question of law.

5. That the State of Michigan's case law and Statutory law which Plaintiff-Appellant argued have been overlooked or misapprehended by this Court.

RELIEF REQUESTED

WHEREFORE, Plaintiff-Appellant prays that this Honorable Court will:

A. Grant Plaintiff-Appellant a Rehearing *En Banc* or in the alternative a Rehearing by the Original Panel of Justices.

B. Answer Plaintiff-Appellant's Petition for a Rehearing *En Banc*.

C. Stay the disposition of the original Order until such time the question of Rehearing is disposed of.

Respectfully submitted,

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(313) 965-4384

DATED: December 11, 1981

STATEMENT

On November 6, 1981 the Court of Appeals affirmed the Order for Summary Judgment by the United States District Court for the Eastern District of Michigan.

Plaintiff-Appellant requests a Rehearing *En Banc* or in the alternative a Rehearing by the original panel of justices due to the fact that Plaintiff argued points of law and fact in her appellate Brief that were overlooked or misapprehended by this Court.

BRIEF AND ARGUMENT

Argument I

It is not possible from a review of the Michigan Statutes regarding the duties of the Friend of the Court, to determine if the acts complained of by Plaintiff-Appellant fall within the realm of ministerial or discretionary acts, and therefore it is not possible to grant Summary Judgment for quasi-judicial immunity as a matter of law based on the Michigan Statutes.

MCLA 552.251; 552.251 (a) and 552.253 uses the word "shall" throughout its language indicating that most of the duties of the Friend of the Court are mandatory and therefore, ministerial. (See Plaintiff's original Appellate Brief, pp. 16, 17 and 20.)

Furthermore, all of the actions Plaintiff-Appellee alleges, fell within the ministerial duties of the Friend of the Court and none of them fell within the discretionary duties of said defendant.

Even though the Friend of the Court per MCLA 552.252 (a) " . . . shall petition the court for modification of the judgment when he *deems* it in the interest of the . . . child or children . . . (Clearly discretionary) his recommendations to the Court are derived from his ministerial duty to " . . . shall examine all records and files in divorce cases . . . and conduct such other investigation as is necessary to ascertain if such payments are sufficient in view of both changing economic conditions and financial conditions of the parties."

Furthermore, it is not true, as Defendants-Appellees stated at Oral Argument, that the Friend of the Court is prohibited by statute from reviewing support payments more often than every two years, as MCLA 552.252 a. (b) states the Friend of the Court " . . . may . . . on his own motion, in cases where he is informed and believes that due to such changing conditions the judgment should be modified.

Argument II

Michigan Case Law nor Federal Case Law grants absolute or quasi-judicial immunity as a matter of law.

In *Tocco v Piersante,* 69 Mich. App. 616, the Court stated:

"Public officials are not entitled to protection of govern-

mental immunity from tort liability for their own malicious or intentional torts even though acting within the scope of their employment."

In *Walkowski v Macomb Sheriff,* 64 Mich App 460 (1975) the court stated that although judicial officers are immune, they are only immune if they act within the scope of their jurisdiction. (See Plaintiff-Appellant's original Brief at page 22)

Furthermore, *Walkowski* states that whether a public officer is covered by MCLA 691.1407 affording government immunity depends on whether the injury arises out of ministerial or discretionary acts, and that immunity attaches to discretionary acts only.

If, as Plaintiff alleges, Defendants Tibbetts and Granholm conspired to intimidate her to withdraw her appeal, when Defendant Tibbetts served her with the stale URESA complaint, then they were not acting within the scope of their jurisdiction.

Is the court here, taking Judicial notice that Plaintiff is mistaken or suffering from delusions? Even if this were the case, isn't this a question of fact, not a matter of law?

Furthermore, in *Armstrong v Ross Township,* (1978) 266 NW 2d 674, 82 Mich App 77, the Court said:

"Officials are not immune from liability for ministerial acts under Michigan Law and consequently there is no immunity under federal civil rights statute 42 USCA § 1983 . . . "

There is no Michigan case law or statute stating any official committing ministerial acts is immune from suit, even if that official is a judicial officer if their actions are " . . . malicious and intentional torts even though acting within the scope of employment, *Tocco v Piersante,* 69 Mich App 616 (1976).

In *Lawrence v Department of Corrections,* 81 Mich App 234 (1978) the Court said the commissions of an intentional tort is not a government function to which government immunity can be applied.

In *Madison v Gerstein,* 440.F 2d 338, (1971), the court said " . . . the office of a prosecutor would not protect (him) from a claim for damages for his acts directed by him, which might be outside his jurisdiction and without authorization of law. The allegations of the complaint, viewed in the most favorable light to the Plaintiff, left room for the proof of such facts."

In *Bauers v Heisel,* 35 F 2d 581, the court said the Pros-

ecuting attorney's immunity is not without limitation or absolute, and that even a judge's immunity does not extend to acts which are outside of his jurisdiction.

Argument III

The Lower Court and the Appeals Court have based their decisions on a question of fact not a matter of law.

It is obvious from the lower court's review and from the per curiam order that it is a question of fact and not one of law that the courts have based their decisions, evident by the reading of both opinions.

> The per curiam order states that " . . . the board would not be liable in damages for their actions in the absence of a showing that the acts complained of were taken by the individual defendants pursuant to a "policy or custom" of the municipal body, citing *Monell v New York City Department of Social Services,* 436 U.S. 658, 694, (1978), and goes on to say, "There was no such showing in the present case."

How could there be a "showing" when Plaintiff-Appellant has been precluded from trying her case on the merits. Plaintiff has had no opportunity to show the "policy or custom" of the Defendants-Appellees, due to the fact that this Court and the lower court has, in its orders, taken judicial notice of that fact.

Plaintiff contends the issue of whether the acts performed were taken by the individual defendants pursuant to a "policy or custom" of Montmorency County Board of Commissioners is not a question of law, but a question of fact.

Similarly, the lower court and this court's granting of immunity to the Defendant Tibbetts, stating he " . . . is absolutely immune from a claim for damages based upon his official actions performed within the score of his duties, cannot be taken by a mere reading of *Imbler v Pachtman,* 424 U.S. 409 (1976), a case which was itself tried on the merits, to determine if the actions performed were official actions within the scope of his duties, as Plaintiff cited in her Motion to deny Summary Judgment per *Madison v Gerstein,* 440 F 2d 338, (1971), " . . . the office of a prosecutor would not protect (him) from a claim

for damages for his acts directed by him, which might be outside his jurisdiction and without authorization of law. The allegations of the complaint, viewed in the most favorable light to the Plaintiff, left room for the proof of such facts."

In the instant case, and the Defendant Tibbetts does not deny this, Plaintiff was served with a stale URESA Complaint, over 180 days old, (which in itself is against the Michigan General Court Rule 102) and an Order to Show Cause in Probate Court, after she had been ordered to pay support under URESA by the Circuit Court and had filed an appeal against the Circuit Court's decision.

Plaintiff alleges in her complaint that Defendant Tibbetts served her with said URESA complaint to intimidate her to withdraw her appeal of the Circuit Court decision. Plaintiff, believes through testimony and documents, she can prove that Defendant Tibbetts' purpose of serving her with said URESA Complaint was to intimidate her to withdraw her appeal. This allegation is a question of fact not law. Can Tibbetts or any other judicial officer use the semblance of authority to conspire to deprive a person of their civil rights? Can a court take judicial notice that Defendants Tibbetts and Granholm did not threaten Plaintiff? Can Defendants Tibbetts and Grahnolm conspire to deprive Plaintiff of her civil and due process rights without having it adjudicated on the merits whether the acts Plaintiff complains of were within the scope of their employment? What reason would Defendant Tibbetts have to serve Plaintiff with a URESA Complaint after the matter had already been adjudicated and pending in the Michigan Court of Appeals?

Plaintiff states these issues are a question of fact and not law. That without depositions nor testimony, Defendants-Appellees cannot be granted Summary Judgment on the basis of nothing more than bare affidavits stating they are judicial officers and were acting within the scope of their employment.

Argument IV

Case law interpreting Federal Rules of Civil Procedure, Rule 56 Summary Judgments, states Summary Judgments may be granted only if there is no genuine issue as to any material facts, and only if the only issues are issues as a matter of law.

In *Kletschka v Driver,* C.A.N.Y. 1969, 411 F2d 436, the Court said:

> "Summary judgment may not be rendered unless pleadings and supplementary affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

CONCLUSION

Here, the lower court, nor this Court could make the determination as to whether the Defendants are entitled to Summary Judgment as a matter of law, as the Defendants' affidavits merely stated they were officials acting within the scope of their employment, and provided no depositions proving their acts were discretionary, and not ministerial.

Plaintiff-Appellant has met her burden to prove she has a cause of action, based on a question of fact, by her many exhibits and the many disputed facts noted in the allegations made in Plaintiff's original complaint, and the denials made in Defendants' answer to said original complaint.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICIA A. JOHNSON,
Plaintiff-Appellant,
v
THEODORE C. GRANHOLM, MICHAEL F. LUND, DAVID F. TIBBETTS & MONTMORENCY COUNTY BOARD OF COMMISSIONERS,
Defendants-Appellees.

ORDER

Before: LIVELY and MARTIN, Circuit Judges, and WEICK, Senior Circuit Judge.

No judge in active service on the court having requested a rehearing *en banc,* the petition for rehearing filed herein by the plaintiff-appellant has been referred to the panel which heard arguments in this appeal.

Upon consideration, the panel concludes that the issues raised in the petition for rehearing were fully considered upon submission and decision of this appeal and that rehearing is not required. Counsel is advised that questions are asked from the bench in order to obtain additional information about an appeal and are not to be treated as expressing an opinion about the outcome of the appeal being argued.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

Clerk